

NORTH AMERICAN LAW IN NEW ZEALAND 1875-1975 – LESSONS FROM THE OTAGO DISTRICT LAW SOCIETY LIBRARY

**Jeremy Finn,
University of Canterbury,**

Author's Note

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PART 1: The Project

I would like to start by thanking the Otago District Law Society which provided me with a substantial research grant in 2004 which funded a great deal of work by my research assistant Charlotte Wilson who assembled much of the material on which I have drawn for this paper. I would also acknowledge the contribution of New Zealand Law Foundation for its financial backing of this project. .

The grant and Charlotte's work have allowed me to reconstruct a substantial part of the library's history and to have a chance to consider the changing patterns of library holdings. There is also archival material relating to the administration of the library and the purchase of textbooks which gives us an opportunity to see - at least to some extent - the priorities that were observed by ODLS members in their purchase of legal materials. Analysis of that data has been combined with study of patterns of citations of overseas authority, to try to see what we can learn about the transmission of legal ideas from overseas to New Zealand, and how this impacted – or did not impact – on New Zealand lawyers.

I had hoped to be able to obtain some further information about the use of North America legal materials from the library records which were ostensibly record the borrowing by practitioners of books from the library for use in court and, separately, the borrowings by the judge of the Supreme Court.¹ Unfortunately it is clear that these registers are so incomplete as to be of only minor value. On the one hand the minutes of the Library Committee regularly refer to complaints that lawyers, or the judge, had removed books from the library without this being recorded. On the other, it is noticeable that the borrowing records contain no entries which correlate with significant cases reported in the New Zealand Law Reports in which a number of overseas authorities were cited. We must treat the borrowing records therefore as only capturing a fraction – and unfortunately a very imprecise fraction - of the actual use of North American materials.

¹ See ODLS “Register of Books Borrowed” (3 vols) and “Register of Books Borrowed by the Judge”, ODLS Library. I have been seeking, so far unsuccessfully, access to the Judge's Notebooks held in the Dunedin branch of the National Archives. That is a long and painful story not to be rehearsed here.

The lawyer's borrowing record does show some borrowing of American textbooks, but only one citation of a Canadian reports and one of the United States reports. The Judge's Register shows slightly more regular use of North American texts, but only two borrowings of Canadian reports and one borrowing of a volume of the US Reports. However that record does not correlate with citations of North American cases cited in Dunedin cases reported in the *New Zealand Law Reports*, so I doubt its comprehensiveness.

Similar reservations attach to an attempt to assess practitioner demand from the materials in the Library Committee minutes and, less reliably, from the contents of a rather underused "Recommendations" book kept in the ODLS Library. That book shows very few suggestions for materials from jurisdictions other than England and New Zealand. The only suggestion recorded for American works was in 1934 when some practitioner (unfortunately with an illegible signature) suggested the purchase of text books on American mining law. This suggestion is firmly annotated with the word "declined". Better luck attended the suggestion in 1939 that the library purchases some digest of Australian law because the case reports were impossible to use without such assistance. That recommendation is annotated with the response that the *Australian Digest* had been ordered.²

2. The setting

The Otago District Law Society (ODLS) has been in continuous existence since the 1870s and since 1879 has controlled and funded the principal Law library for legal practitioners in the province of Otago. (For those of you whose knowledge of the Zealand geography is a little scanty, Otago is in the southern part of the South Island of New Zealand with its principal centre being Dunedin).

Dunedin was in colonial times the largest of the metropolitan centres in New Zealand. It's derived its status and wealth from its entrepot position commanding the bulk of trade with the largest and most long-lived of the New Zealand goldfields. In addition the Otago region was a fertile farming area and included many of the farms which pioneered the export of frozen meat to Britain. Although Otago is now a relatively minor player compared to the northern centres, its political and financial importance was for many years much greater than its population alone would justify. It is particularly important to note that up until the 1960s many New Zealand companies had their business headquarters in Dunedin. This meant of course that much of the litigation concerning these companies was conducted by members of the Otago legal profession.

In 1874 in circumstances which are still somewhat of a mystery the New Zealand government agreed to fund the establishment of a library in Dunedin for the use of the judges of the Supreme Court (now the High Court) and for the use of local lawyers as well. In 1879 this library was taken over by the Otago District Law Society (ODLS) and they have continued to operate and funded ever since.

² The timing seems fortuitous, as discussion of the purchase had been in progress for some time. See n29, below.

There is a traditional account, of questionable authority, which suggests the following:

“Tradition informs us that this Library was founded many years ago at a time when Dunedin was the commercial capital of New Zealand and its Bar the strongest in New Zealand, that one of the members of the Bar was sending his son to England to complete his education in Law. Accordingly the members gave the son a cheque with instructions to purchase the nucleus of a Library and that the only way he could do that, at that time, was by purchasing a number of small private libraries. This is the reason why the Library contains a number of rare and interesting books the like of which cannot be found in any other Library in New Zealand.”

Undated memo, probably 1959, in ODLS Library Correspondence, Hocken Library item 01-20-9 Box 20.

3 The Library

(i) creation and scope

It is important to note that in the first 30 to 40 years of the library there was a considerable divergence between two of the principal legal materials acquired, the reports of legal cases and the legal textbooks. The vast majority of the reports held in the ODLS library were very much the standard English lawyer's materials. From the earliest days there was a virtually complete set of the Nominate Reports and the library had subscriptions to all the English law reports then being published. The other British jurisdictions were also well represented, with report series for the Irish and Scots courts.. There is an considerable imbalance in a purely numerical terms of when one considers the law reports held by the library in the 1870s. One can identify 316 different reports was series of reports from England and Ireland. These must be set against three reports from Australia and three from New Zealand.³ There was also a set of the United States Supreme Court Reports and the digests for that set of reports.

The initial collection of textbooks shows a very strong English influence – as one would expect. By my calculations there were 227 English titles,⁴ to which should be added four on Scottish law, two from Australia and a lone New Zealand publication.⁵

³ The Australian reports, all from Victoria, were *Wyatt and Webb's Reports*; *Wyatt, Webb, and A'Beckett's Reports* and *Webb, A'Beckett, and Williams's Reports*. The New Zealand series were the *New Zealand Jurist*; *Macassey's Reports* and *Johnstone's Court of Appeal Cases* Curiously the libraries seems to have been very slow to acquire the last of the early New Zealand reports, *Ollivier, Bell & Fitzgerald's Reports*, (published 1878-1880) which were acquired only after 1963.

⁴ The count is based on apparent place of publication. Thus Judah Benjamin *The Law of Sale of Personal Property, with references to the American Decisions and to the French Code and Civil Law* (2nd ed 1873) is counted as English, as is an edition of Montesquieu *Spirit of Law*.

⁵ The Australian volumes were Gurner *Criminal Law of Victoria* (1871) and McFarland *Law of Mining* 1869; the New Zealand text was *Johnstone's Justice of the Peace (NZ)* (2nd ed, 1870).

In addition there were 29 books published in the United States. The bulk of these came from Boston and New York. Apart from the general works such as *Kent's Commentaries on American Law* (4 vols, 11th ed 1867), *Wheaton's International Law* (8th ed, 1868) and Story's *Equity Jurisprudence* the bulk of the works dealt with commercial subjects. There were, for example, four works on insurance and the same number on banking and negotiable instruments etc, three each on contract and company law. The eminent place of Story in nineteenth century American legal writing is reflected in the fact that 11 works bore his name, mostly in various editions by successor editors.

1900

July 27th Minutes of the Library Committee Meeting

Books order to enquire as to price of Queensland and South Australian Reports to complete own set

Letters from Whitcombe and Tombs read and from Binder- to enquire how many back volumes of Australasian Digest issued and to send £50 to Stevens and Son

We have little of the clearly very substantial correspondence between the ODLs Librarian and legal publishers, but some flavour of it can be gained from the surviving material for 1936-37. It is clear that the publishers regularly supplied both circulars advertising existing or forthcoming publication, and on occasion copies of texts were sent for the Library Committee to consider.⁶

While the early records of the Society do not record financial information reliably, we are able to be reasonably precise about the costs of the Library. Spending on legal materials – statutes, reports, textbooks and ancillary material .

In 1936 such spending was £223-13-4 – one of the lower years recorded. For most of the 1930s and early 1940s the figure fluctuated between £250 and £300, rising to over £320 in 1949 and to more than £400 in 1952. Although there was slight decline in 1956-57, the overall trend was up. In 1959 they reached £564 and touched a new high of £993 in 1962. This figure was not exceeded until 1968 (\$2257). Increases in holdings – and inflation generated by New Zealand's devaluation of its currency in 1967 and subsequent years – to almost doubled that figure by 1974 (\$3938) and again by 1976 (\$7295).⁷

We may get some impression of the relative costs of the American materials in the early years from one of the occasions where the figures are sufficiently comprehensive and detailed to allow calculation. In 1915 the Society spent just over £200 on all its legal materials. Of this amount, £6-4-0 was spent on the American reports purchased through Bancroft and Whitney, or around 3% of the total spend. By contrast the Society spent £9-9-0 on its set of the *New Zealand Law Reports* and £37-10-0 on the English reports

⁶ "Publishers and book companies" ODLs collection, Hocken Library 94-159 101 .

⁷ Figures from ODLs Annual Reports 1937-1977, compiled by Charlotte Wilson. In each case there was also a cost of binding materials, which ranged from as little as £30-19-0 in 1945 to a more normal £50-60 per year (or, after 1967 the dollar equivalent).

published by the Council of Law Reporting. The total spending that year was, as with other war years, below the peace time average, so these report figures are somewhat higher proportions of the total than would otherwise be the case. By contrast in 1952, it seems spending on US reports was £6-6-9 out of a total of about £400, but the (undiscoverable) costs of the Canadian materials must be added to that. The proportion of costs going to North American materials may therefore have been reasonably close to that in 1915.

(ii) Developments before 1914 – the hey-day of US material

In 1886 the major development was the acquisition, through influence with the Government, of *Hansard* and the *Journals of Parliament*.⁸

At some point, probably in the late 1880s or early 1890s, the ODLS was purchasing the *American State Reports* for the library. It is not clear when the purchases start – the acquisition is not noted in any Annual Report but we have clear archival evidence of payment from 1896.⁹

>>The archives also tell us that the ODLS subscribed briefly (1894-1897) to the Albany Law Journal at some point in the 1890s, probably around 1894.¹⁰ The selection of this journal may have been influenced by memories of the publishing of extracts of it on a fairly frequent basis by the *New Zealand Jurist* in the 1870s.

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The Society was still purchasing a fair number of American volumes throughout the 1890s, as in 1896 with the purchase of *American Negligence Cases 1895-1896*.¹¹ However in that same year came a foretaste of the future, when the Society ordered an English edition of *Story's Equity Jurisprudence* rather than an American version.¹²

The mechanics of the purchase of American materials is not clear, although it seems quite possible many were purchased from booksellers who had imported them from the United States. In the 20th century it appears that at least on some occasions American textbooks were ordered through British wholesalers or publishers.

The Minutes record receipt of a letter in January 1888 from the Registrar of the Supreme Court Ottawa, Canada about the “Canadian Reports”..¹³ It may be assumed the response encouraged action, because at the 1890 Annual General Meeting it was said that a set of

⁸ Minutes of AGM 31 January 1887, ODLS Minute Book, ODLS Library

⁹ See minutes Meeting of Library Committee March 6 1896, in ODLS memoranda book, ODLS library. By 1894 the ODLS appears from at least 1894 to have two different subscriptions to reports put out by the publishers, and it is possible one of these was for the *American State Reports*. (see Minutes ODLS Council 8 June 1894, ODLS Minute Book 1878-1898, ODLS Library) and this may indicate a subscription date before 1896.

¹⁰ The earliest payment noted in the minutes is in 1894: Minutes ODLS Council 8 June 1894, ODLS Minute Book 1878-1898, ODLS Library. The termination of the subscription is noted Minutes Library Committee 8 October 1897, ODLS Minute Book.

¹¹ Memorandum 10 July 1896, ODLS Memoranda Book, ODLS Library.

¹² Memorandum 23 October 1896, ODLS Memoranda Book, ODLS Library.

¹³ Minutes of Council Meeting 6 January 1888, ODLS Minute Book, ODLS Library

the “Reports of the Supreme Court of Canada” had been procured – as had the Queensland Reports.¹⁴

In 1892 the report to the annual general meeting stated in a somewhat self-congratulatory tone that:

“.. a number of new books have been added to the library during the year and it is believed that the society now has in the library all the latest editions of text books.”¹⁵

Two years later the tone was a little more modest:

“A number of new books have also been added to the Library and it is believed that the library is fairly complete in this respect.”¹⁶

In 1905 the society inquired about the price of the *American and English Encyclopedia of Law* and later that year resolved to purchase it for the substantial sum of \$240.00.¹⁷ As we will see, this work had already been in substantial use in other centres.

(iii) The first World War and after – leaning back to England and expansion of Canadian holdings

It is noticeable in the years of the First World War that significantly fewer books were bought over all¹⁸ and what was bought was almost invariably bought from England. I have not found any new American texts ordered during these years.

There was certainly a decision in 1915 to decline to purchase *Wigram on Evidence* even though this had been recommended by the Librarian.¹⁹ That was not the only victim of caution; the Library Committee also decided against the purchase of what became the standard (indeed for many years the only!) New Zealand work on Criminal Law, James Garrow’s *Crimes Act 1908*.²⁰

More drastically in 1916 the library committee decided to begin cutting its former subscriptions to American material with the decision to cancel the subscription to the *American Annotated Cases*. But at the same meeting it was decided to purchase the *New South Wales Reports*.²¹ Other American works were maintained. It is interesting that in the following annual general meeting there were specific mention of the discontinuance

¹⁴ Minutes of AGM 17 February 1890, ODLS Minute Book, ODLS Library. Curiously no other mention of what might have been expected to be a substantial transaction appears in the minutes for that year.

¹⁵ Minutes of AGM 4 February 1892, ODLS Minute Book, ODLS Library

¹⁶ Minutes of AGM 29 January 1894, ODLS Minute Book, ODLS Library

¹⁷ Minutes of Council Meetings 10 November 1905, 2 February and 19 October 1906, ODLS Minute Book, ODLS Library.

¹⁸ This being in large part because: “Very few textbooks or new editions of text books have been published during the year hence there have been very few additions to the Library” Minutes ODLS AGM 4 February 1919, ODLS Minute Book, ODLS Library

¹⁹ Minutes ODLS Library Committee 25 June 1915, ODLS Minute Book, ODLS Library

²⁰ Minutes ODLS Library Committee 18 May 1915, ODLS Minute Book, ODLS Library

²¹ Minutes ODLS Council 3 July 1916, ODLS Minute Book ODLS Library

of an English publication but nothing was said about the canceled American subscription.²²

The most important acquisition of the post-war years was the *English and Empire Digest*. It is clear that the society was eager to acquire the work, as the ODLS agreed to subscribe to that work prior to the first volume being published.²³

At the annual general meeting in 1926 members of the society appeared to have directed the executive to them and the cost of completing the holding of Australian law reports.²⁴ The Society purchased the back-runs of the Queensland Reports (unbound) for £25 and the South Australian Reports for £47.²⁵ That is a large total for a Society whose normal Library purchases appear, at this stage around 250-300 pounds

In the following year the Library Committee sought to economise by suggesting the cancellation of the *United States Advance Opinions*, the *New Zealand and Australian Digest* and the *Argus Law Reports* (this latter on the basis that “the majority of the cases are reported in the Victorian Reports and the Commonwealth Reports”). British materials escaped more lightly – the suggestion being that the English and Scottish Law Lists be ordered every three years instead of annually and “That the continuance of the Justice of the Peace Journal be referred to the Council for its opinion”.²⁶

This move to cut certain subscriptions may have been intended to balance new expenditure, as in 1927 the Society began to consider seriously, for reasons which are not yet clear, the expansion or improvement of the Canadian holdings. Thus we find a decision to have the Society’s Secretary write to the Law Librarian of the Wellington DLS to ask which Canadian Reports would be best purchased.²⁷ Later that year that was decided to write directly to the Registrar of the Canadian Supreme Court in search of more information.²⁸ In the following year the Society purchased 36 back volumes of the Canada Law Reports and took out a subscription for the future.²⁹ A new American Digest was also purchased in 1928.³⁰

(iv) *The depression and cut-backs*

In the 1930s the financial pressures of the Depression clearly hit the Society hard, and there was reluctance to purchase substantial works of any kind. This is exemplified by one meeting in 1934, where the Committee first declined to purchase two American texts

²² Minutes ODLS AGM 9 February 1917, ODLS Minute Book, ODLS Library

²³ Minutes ODLS Council 29 August 1919, ODLS Minute Book, ODLS Library

²⁴ Minutes of AGM 19 February 1926, ODLS Minute Book.

²⁵ Minutes of Council 28 May 1926 and 30 July 1926 ODLS Minute Book.

²⁶ Minutes of Library Committee 6 June 1935, ODLS Minute Book.

²⁷ Minutes of Council 26 August 1927 ODLS Minute Book.

²⁸ Minutes of Council 4 October 1927 ODLS Minute Book

²⁹ Minutes of Council 22 June 1928 ODLS Minute Book. At a later meeting, the Council was resolute that “Council accepts no liability for any, if any, increase of cost by reason of the volumes being bound in half calf instead of buckram”: Minutes of Council 28 September 1928, ODLS Minute Book.

³⁰ Minutes of AGM 22 February 1929, ODLS Minute Book

recommended by a member, and then decided not to order a volume of American cases or the *Canadian Digest*.³¹

In the following year the Library Committee sought to economise by suggesting the cancellation of the *United States Advance Opinions*, the *New Zealand and Australian Digest* and the *Argus Law Reports* (this latter on the basis that “the majority of the cases are reported in the *Victorian Reports* and the *Commonwealth Reports*”). British materials escaped more lightly – the suggestion being that the English and Scottish *Law Lists* be ordered every three years instead of annually and “That the continuance of the *Justice of the Peace Journal* be referred to the Council for its opinion”.³²

Financial pressures may also have influenced the 1936 decision to defer a decision on the *All England Law Reports*.³³ The most severe approach of all was in 1937, where at a single meeting the Committee declined to order consolidations of the statutes of, respectively, the Commonwealth of Australia, New South Wales and South Australia, the *Australian Law Journal* and all five texts suggested by the Librarian.³⁴

At that same meeting the Library Committee considered the purchase of the *Australian Digest* -a 20 volume work which must have had a substantial price-tag- with the Secretary being directed to find out from the publishers whether the *English and Empire Digest* could not fulfill the same function.³⁵ This drew a spirited response from the Law Institute of New South Wales :

“..while the *Australian Digest* is a comprehensive digest of Australian and New Zealand cases, the *English and Empire Digest* is not a complete digest”.³⁶

Some weeks later the matter was discussed again. Uniquely the Minutes of the Library Committee set out the rival contentions as to the degree of utility of the work and its cost, and then deferred the decision for six months.³⁷ Clearly the decision was over-ridden by the Society’s Council because the *Digest* was ordered the following month.³⁸

Throughout the 1930s - perhaps influenced by the strictures of the Depression - the Society tended to be unreceptive to suggestions from members or from the Librarian that American materials be purchased, although the *Harvard Law Review* was ordered in 1931, on the suggestion of a society member, after the cost had been ascertained.³⁹

³¹ Minutes of Library Committee 29 November 1934, ODLS Minute Book. The only texts ordered on that occasion were a new dictionary and *Taylor’s Medical Jurisprudence* .

³² Minutes of Library Committee 6 June 1935, ODLS Minute Book.

³³ Minutes of Library Committee 14 May 1936, ODLS Minute Book.

³⁴ Minutes of Library Committee 25 November 1937, ODLS Minute Book.

³⁵ Minutes of Library Committee 25 November 1937, ODLS Minute Book

³⁶ The Incorporated Law Institute of New South Wales to ODLS 14 December 1937 in “Publishers and book companies” ODLS collection, Hocken Library 94-159 101

³⁷ Minutes of Library Committee 15 February 1938, ODLS Minute Book

³⁸ Minutes of Council 28 March 1938, ODLS Minute Book..

³⁹ Minutes of Council 28 March 1938, ODLS Minute Book

In 1938, too the Society began to explore the purchase of the *Dominion Law Reports*⁴⁰ which were ultimately purchased – together with a second-hand set of 134 back volumes at a price of £95 in 1939.⁴¹ The ODLS sought, apparently unsuccessfully, to find a buyer for some of its existing Canadian material to offset that cost. These purchases pushed Library spending to over £400 for the first time.⁴²

The biggest single issue for the Library in this period was however the substantial discontent expressed with Butterworths for commencing the publication of a new edition of Halsbury's *Laws of England* shortly after the previous edition had been completed. Otago appears to have led a chorus of protest from the different New Zealand societies,⁴³ but eventually to have accepted the position after a company representative addressed the ODLS Council.⁴⁴

This was not the last problem encountered by the society with this publication. In 1940 the ODLS was asked to pay for four extra volumes of the publication. When the society objected, Butterworths (the publishers) acknowledged that the extra volumes were outside the contracted quantity and that there was no legal obligation on the society to pay for the volumes. However a representative of the company addressed the ODLS in a January, 1941 and persuaded the society that they should meet the moral obligation to pay the extra charge because the product was of a higher quality than had been promised.⁴⁵

(v) World War II and after – Australia dominant

Other decisions in the 1940s and 1950s emphasize the move away from American law. Thus in 1949 it was decided not to order copies of new *Digests* for the *United States Reports*.⁴⁶ In other cases the problem was that wartime conditions had held up production of desired works or that restrictions on foreign exchange transactions

⁴⁰ Minutes of Council 28 March 1938; Minutes Library Sub-Committee 27 June 1939, ODLS Minute Book.

⁴¹ Minutes of Library Committee 27 June 1939, Council 23 April and 30 July 1931 ODLS Minute Book.

⁴² Minutes of AGM 23 February 1940 ODLS Minute Book.

⁴³ The ODLS had apparently written to the NZ Law Society indicating a belief that practitioners would be forced into purchasing the new edition because the judges and government departments had ordered them: "The general feeling of the profession here is that publication after publication is being brought out especially by Messrs Butterworth as a regular business: approval is obtained from the Judiciary (who do not pay for them at all) and from the Government Departments (who pay for them out of public money). The profession is then forced to make reference to them and consequently to buy them. We trust we are not insensible to the value of many of the publications but there is a limit to everything and in default of the limit being defined in this case the profession will shortly be working for the Government and Messrs Butterworth": copy letter, undated but January 1932, ODLS collection, Hocken Library item 94-159-77 "Books etc". The ODLS received, but apparently did not forward, a complaint in similar terms from a country practitioner about a proposed new series in the 1950s, see Brodrick & Parcell to ODLS, 10 April 1952, ODLS collection, Hocken Library item 94-159-198 "Books etc".

⁴⁴ See Minutes of Council 26 November 1931, 18 December 1931 and 27 January 1932; Minutes of AGM 26 February 1932.

⁴⁵ Minutes of Council 15 and 28 January 1941, ODLS Minute Book.

⁴⁶ Minutes of Council 16 February 1949 ODLS Minute Book.

prevented purchases on the desired scale.⁴⁷ Money was not the only obstacle to expanding of the library's holdings; in some cases the purchases – as with the *Dominion Law Reports Digests* purchased in 1948 - were substantial enough to require the Society to obtain an import licence.⁴⁸

Australian holdings were also amplified – notably by the acquisition in 1954 of the *Australian Pilot to Halsbury's Laws of England*⁴⁹ but difficulties were sometimes encountered in doing so. Thus in 1961 the Society began a subscription to the *Western Australian Reports*, after having considered subscribing to the predecessor series in 1957 but being unable to secure a back-run of the reports from the publisher.⁵⁰ There was little comparable expansion of North American material, though in 1963 the Society purchased, amongst other things, the *Canadian Abridgment*.⁵¹

However in the nineteen fifties several features stand out.

Firstly there is an increase in the number of books published in New Zealand which were acquired by the library.

CAN WE GUESS?

Secondly there were far more acute issues as to the relationship between the University Library and that of the society.⁵² This is clearly a reflection and the growth of students who studied for the LLB degree as their mode of entry to the legal profession..

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Other library

By 1934 the ODLS catalogue listed 1020 works, of which 959 were English and 59 American (the latter being almost entirely 19th century titles). The Australasian works had nearly gained parity in the numbers with 28 New Zealand titles, eighteen from Australia and a further nine works which considered the law in both the jurisdictions. There were about four Canadian texts and these were all on specialized public law areas.⁵³

By comparison the Auckland District Law Society library appears to have been slower to acquire the few New Zealand texts of the period. The 1909 ADLS Catalogue lists 341

⁴⁷ Minutes of AGMs 25 February 1946 and 12 February 1942 ODLS Minute Book.

⁴⁸ Minutes of AGM 21 February 1949, ODLS Minute Book. The most extreme reaction to the war situation was the decision, after Pearl Harbour "...that the contents of the Library and the Wigs and Gowns in the Robing Room be insured against War Risk immediately.". Minutes of Council 22 December 1941, ODLS Minute Book.

⁴⁹ Minutes of Council 11 February 1954, ODLS Minute Book.

⁵⁰ Minutes of Council 14 February 1961, ODLS Minute Book. The Society had sought to arrange a private purchase of the back-run without, it seems any success. Minutes of Council 17 July 1957, ODLS Minute Book.

⁵¹ Minutes of Council 26 August 1963, ODLS Minute Book

⁵² See for example Minutes of Council 17 June 1954. ODLS Minute Book

⁵³ 1934 ODLS catalogue, ODLS records.

titles, of which 297 are English, and 30 American. Once again there are but two Australian texts and one from New Zealand.⁵⁴

Both ODLS and ADLS held the American State Reports covering much of the early part of our period (in ODLS's case volumes 1-140 for 1887 – 1911) with appropriate digests. Auckland also held the American Reports series, though the start date is not known. Wellington does not appear to have possessed the State Reports series though by 1914 it did hold both Annual Digests of American Law and the second (1907) edition of the American and English Encyclopedia of Law (2nd ed 1907).

At some unknown point after 1874 the ODLS Library acquired three different Digests of Irish law, perhaps most importantly an 1893 Digest of the Irish Reports.

Access to Australian decisions must have been facilitated by the existence of a Victorian digest of 1895 and a New South Wales digest of 1904.

Check date Aust Digest 1933

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South Australian Digest **NO date dammit check others or UC**

The existence in the library of a digest was, of course, no guarantee it would flow through into legal citation – the WDLS library in 1914 had a copy of Bell's Cape Law Digest, but there is nothing in the law reports to indicate it was ever cited.

Another measure of the importance of American law in insurance litigation at this time is the presence in the ODLS library of Fairman's *Insurance Statutes of New York* (1885).

A significant extra report series was acquired in 1896 when the Society first purchased the *Argus Law Reports* "on the suggestion of Mr Stewart" who appears to have been a member of the ODLS Council though not a member of the Library Committee.⁵⁵

In addition to the American law reports-the society was purchasing the Albany Law Journal from 1896 at the latest.⁵⁶

In 1904 there was some investigation of the possibility that the society might import and reports and other books directly rather than going through a supplier. Some years later a local lawyer who was visiting England was commissioned to bring back £50 worth of books. **REFCE**

⁵⁴ ADLS catalogue 1909. I would like to thank Janioe woelford **check** for arranging access to the relevant material.

⁵⁵ Minutes of Council Meeting 27 April 1896, ODLS Minute Book, ODLS Library

⁵⁶ The earliest payment- noted in the minutes was in July 1896 . the state of the minute book suggests it is possible that payments in earlier years had gone unrecorded.

In 1923 the Society made inquiries of a Scots publisher of available modern Scottish law publications,⁵⁷ but the following year resorted instead to seeking advice from a local practitioner as to the best books on Scottish law for them to purchase.⁵⁸

In 1905 the society inquired about the price of the American and English encyclopedia of law and later that year resolved to purchase it for the substantial sum of \$240.00.⁵⁹

The mechanics of the purchase of American materials is not clear, although it seems quite possible many were purchased from booksellers who had imported them from the United States . In the 20th century it appears that at least on some occasions American textbooks were ordered through British wholesalers or publishers. See you for example the purchase of Philips' Mechanics' Lien- £1.11.6 from Stevens and Son But of London in 1907.- **NB refce**

The Australian holdings were a slower to develop .

In 1910 there was discussion of the acquisition on a regular basis of several Australian publications but the decision was left over for the future. At a subsequent meeting it was decided to order the *Commonwealth Law Reports*.⁶⁰

In 1910 it appears that Butterworths offered to supply the Society with all its requirements at a substantial discount, apparently in return for a sole agency. The offer was declined.⁶¹

There were clearly some invitations to purchase which were hard to decline as with the 1921 request from Sir John Salmond that the Society subscribe to the yearbook of international law. The ODLS minutes simply record the volume would be ordered.⁶²

In 1923 there was a change in the US reports, with the suppliers substituting the Lawyer's Co-Operative edition for the earlier version.⁶³ **I THINK** ODLS later switched form B&W

It is in evident that on occasion practitioners in other centres sought access to the report series held by the ODLS Library (and we may assume not readily available elsewhere) as with a request in 1934 by a Wellington- practitioner to borrow a copy of (1886) 20

⁵⁷ Minutes of Council Meeting 23 November 1923 ODLS Minute Book, ODLS Library

⁵⁸ Minutes of Council Meeting 21 April 1911, ODLS Minute Book, ODLS Library. "Mr Paterson" recommended "*McLaren's Law of Wills and Succession*- 2 vols £2, *Menzies- Laws of Scotland affecting Trustees* £2. and *Walter- Laws of Husband and Wife in Scotland*.

⁵⁹ Minutes of Council Meetings 10 November 1905, 2 February and 19 October 1906, ODLS Minute Book, ODLS Library.

⁶⁰ Minutes of Library Committee 28 January and 1 April 1910, ODLS Minute Book, ODLS Library

⁶¹ Minutes of Council Meetings 13 May and 27 May 1910, ODLS Minute Book, ODLS Library

⁶² Minutes of Council Meetings 4 February 1921, ODLS Minute Book, ODLS Library

⁶³ Minutes of Council Meeting 27 July 1923, ODLS Minute Book, ODLS Library

Irish Law Times. Conversely the ODLS library was the conduit through which Otago practitioners could borrow volumes from other regions, as with a 1944 request to borrow a volume of the Ontario Reports.⁶⁴

Wellington lawyers would have had the advantage from at least 1942 of access to significant quantities of American legal materials (including the US Reports) which the US Government provided to the General Assembly library for public use.⁶⁵

Gunns income tax

Perhaps not coincidentally the ODLS library had been seeking unsuccessfully throughout 1946 to acquire a copy of the first edition (1943) of this work.

ODLS collection, Hocken Library, item 94-159-162 Books 1946.

In its early decades the Otago library may well have provided local lawyers with a significantly better set of materials than was available elsewhere. Certainly the judges may have enjoyed the facilities as when kind that there was no separate judges library in Wellington until 1903. That library has been substantially underwritten by the government but in 1913 the government subsidy was lost and the various all societies were levied to keep the library going.⁶⁶

We may get some impression of the relative costs of the American materials from one of the few years where the figures are sufficiently comprehensive and detailed to allow calculation. In 1915 the Society spent just over £200 on all its legal materials.. Of this amount, £6-4-0 was spent on the American reports purchased through Bancroft and Whitney, or around 3% of the total spend. By contrast the Society spent £9-9-0 on its set of the *New Zealand Law Reports* and £37-10-0 on the English reports published by the Council of Law Reporting. The total spending that year was, as with other war years, below the peace time average, so these report figures are somewhat higher proportions of the total than would otherwise be the case. It must be remembered that in addition to the publisher's price, the Library also had to pay substantial sums to have many of the reports suitably bound.⁶⁷

⁶⁴ ODLS collection, Hocken Library, item 94-159-136 Books and Applications 1942.

⁶⁵ Undated (but 1942) circular ODLS collection, Hocken Library, item 94-159-136 Books and Applications 1942.

⁶⁶ Minutes of AGMs 14 February 1913 and 6 February 1914, ODLS Minute Book, ODLS Library

⁶⁷ A 1933 document indicates some 40% of the expenditure on books and periodicals was for binding, but it is not possible from the documents to determine what costs related to new material and what to repair of old volumes. Undated memo of library costs for 1933, ODLS collection, Hocken Library 94-159 80.

4. Citations data and the transmission of North American Law

(i) the numbers

The second departure point for this paper is the diverse history of the citation of North American – US and Canadian material in the New Zealand courts between 1870 and 1960. We may start with the strange fact that more US decisions were cited in the 1880s and 1890s than at any time up until the late 1970s. By contrast the use by New Zealand lawyers of Canadian cases shows a pattern of generally steady growth from the first trickle of cases cited in the 1890s to a steady 20 or 30 cases a year in the late 1970s.

FIG 1 – citation 1870 – 1980

| | US | Can |
|---------|----|-----|
| 1871-5 | 2 | - |
| 1876-80 | 5 | - |
| 1881-85 | 12 | - |
| 1886-90 | 22 | - |
| 1891-95 | 23 | 1 |
| 1896-00 | 14 | - |
| 1901-05 | 20 | 4 |
| 1906-10 | 24 | 1 |
| 1911-15 | 36 | - |
| 1916-20 | 37 | 1 |
| 1921-25 | 9 | 1 |
| 1926-30 | 3 | 3 |
| 1931-35 | 32 | 22 |
| 1936-40 | 3 | 15 |
| 1941-45 | - | 15 |
| 1946-50 | 7 | 21 |
| 1951-55 | 1 | 20 |
| 1956-60 | 1 | 12 |
| 1960-65 | 17 | 40 |
| 1966-70 | 22 | 61 |
| 1971-75 | 21 | 57 |
| 1976-80 | 34 | 86 |
| | | |

A shorter and simpler set of figures is Fig 2

| | US cases cited | Canadian cases cited |
|-----------|----------------|----------------------|
| 1881-1920 | 188 | 7 |
| 1921-1960 | 56 | 110 |

(ii) *Of textbooks, casebooks and digests*

The primary thesis of this paper is that we should look on these changes in lawyers practice and apparent judicial attitudes to North American cases as being determined at least as much by the nature of the materials available to lawyers as by any political or social or educational agendas.

The first three decades of American law in the New Zealand courts is the story of citations from secondary sources. It is not until well after 1900 that we can be certain that a judge actually had a copy of an American law report in front of him.⁶⁸ What then was used instead?

What appears to have been the most common was simply the use of an American textbook in the course of legal argument. The first example I have found is in 1873⁶⁹ but there are many others.⁷⁰ In looking at the cases I found surprisingly few – only five – cases where the citation of North American cases related to the definition of a particular word or phrase on the bases of citation in a judicial dictionary or similar work. The first Canadian case judicially cited – in 1892 – is one of this kind.⁷¹

Perhaps the most charming if not entirely typical of the textbook references comes in 1931 in *Robins v Kennedy & Columb* [1931] NZLR 1134, 1142 where two Canadian cases on the negligent keeping of honeybees are cited and the judge makes it clear that these came from *The Law of the Honeybee* by P R Campbell “General Counsel to the American Honey–Producers League.

The second option which is less common but far from rare is the use of printed collections of leading American cases. In the late nineteenth century this is exemplified by a number of insurance cases where counsel cited either *Hare and Wallace’s Leading cases*⁷² or *Bennett’s Fire Insurance Cases*.⁷³

The third option which is more common toward 1900-1914 was the use by counsel or by the judge of secondary materials such as digests or encyclopedias. The first cited seems

⁶⁸ The first appears to be *Morland v Hales & Somerville* (1910) 30 NZLR 201 at 219, 220 referring to *Richardson v Hardwick* 106 U.S R 252.

⁶⁹ *Scott v Harman*, (1873) 1 NZ Jur 111 at 112, citing a US case described in *Story on Contracts*.

⁷⁰ *Bowes v. National Fire and Marine Insurance Company*, (1888) 7 NZ LR 32 (citing *May on Insurance*; *R v Ross* (1887) 6 N.Z LR 87 at 9 (citing *Parsons on Bills*); . *Hansen v. Cole* (1890) 9 NZ LR 279 (citing *Kent’s Commentaries*).

⁷¹ *Sharland & Co. v. Commissioner of Trade and Customs* (1892) 11 NZ LR557. See also *Lilley v. Commissioner of Customs* (1890) 9 NZ LR 1 at 3; *R v Crago* [1917] NZLR 86 at 89; *Saracen Shoe Co Ltd v Minister of Customs* [1932] NZLR 765, 769 and *In re Wallace, Wallace v Wallace* [1932] NZLR 479, 481.

⁷² *White v. South British Insurance Company* (1879) O.B. & F. (SC) 23; *Mollison v. Victoria Insurance Company* (1883) 2 NZ LR SC 182. Those *Leading cases* are cited in other litigation, see eg *Johnson v McKay*, 2 NZ LR SC 157 at 160. (SC 1883.)

⁷³ For example *Bank of New South Wales v. Royal Insurance Company* (1884) 2 NZ LR SC 345; *National Insurance Company v. Australian Mercantile Union Insurance Company* (1887) 6 NZ LR 153; *Holmes v. National Fire Insurance Company*, (1887) 5 NZ LR SC 360.

to have been *Danforth's United States Supreme Court Digest*.⁷⁴ Later, and much more common, was reference to the *American and English Encyclopedia of Law*.⁷⁵

In the period after 1920, the dominant digest is the *English and Empire Digest* which was cited extensively and often. As with the use of the *American and English Encyclopedia of Law*, most judges were prepared to decide rely on the law as stated in the *Digest*,⁷⁶ cases but there were instances of judicial caution.⁷⁷

In 1918 we have a rare case of a reference to periodical literature as a source of relevant law. In *Fitzgerald v Macdonald* [1918] NZLR 769 at 788 Stout CJ referred to an American case⁷⁸ mentioned in the most recent number of the *Harvard Law Review*. That journal was also cited as a source of US cases in two other decisions in the 1920s.⁷⁹ Curiously I have found only one instance where a North American case citation seems to have come from an article in a New Zealand legal periodical.⁸⁰

In the period to 1920 or so it was common for the judges to note that the full report was not available, and that the judgment was given on the basis of the report in a digest, textbook or encyclopedia.⁸¹ In only one case was there, at this time, judicial reluctance to apply the briefly reported authority for fear or inaccuracy of the secondary source.⁸² It was also common for reference to a textbook or digest or the *Encyclopedia* to prompt the judges to look for further relevant American cases not cited by counsel.⁸³ A convenient example is *Wolters v Public Trustee* (1914) 33 NZLR 1395 at 1397 where Stout CJ cites five American cases – an unusually large number – when determining the proper construction of a will, attributing them to the discussion of the point in *Kent's Commentaries* and the *American and English Encyclopedia of Law*.

(iii) “embedded” references

There is a limited number of cases where a North American reference was imported from references to an earlier New Zealand case in which the North American case had been

⁷⁴ See for example *Harris v. Aldous*, (1899) 18 NZ LR 449 at 461; *Glenny v. Rathbone* (1900) 20 NZ LR 1.

⁷⁵ See for example *State of Alabama v State of Georgia* 54 US Rep 515 cited in *R v Joyce* (1905) 25 NZLR 78; *Fleming v Ramsay* (1905) 25 NZLR 596 citing *Compania de Navigacion La Flecha v Brauer* 168 US Rep 104; *Lucena v National Mutual Association of Australasia* (1911) 31 NZLR 481 at 489; *Partridge & Co v Nathan Co* (1912) 31 NZLR 1229 at 1236.

⁷⁶ *Winsley Bros v Woodfield Importing Co* [1929] NZLR 480, 487; *Candy v Maxwell* [1934] NZLR 766; *James v Smith* [1954] NZLR 707.

⁷⁷ See *Robins v Kennedy & Columb* [1931] NZLR 1134, 1142; *Invercargill Savings-Bank v Genge* [1929] NZLR 375, 379.

⁷⁸ *State ex rel Langer v Kozitsky* 166 NW 534 (ND).

⁷⁹ See argument of counsel in *Coastal Shipping Co Ltd v Wanganui Herald Newspaper Co Ltd* [1929] NZLR 305, 314 by a judge in *Day v Collins* [1925] NZLR 280, 285.

⁸⁰ *Sandford v Graham* [1944] NZLR 16 where Myers CJ seems to have derived reference to *R v Henry* [1934] 2 DLR 51 and *R v Higgins* [1929] 1 DLR 269 from an anonymous article at (1942) 18 NZLJ 187.

⁸¹ See eg *Minister of Customs v Ross & Glendining* (1911) 31 NZLR 220 at 223; *Dalgety & Co v Solicitor-General* (1912) 31 NZLR 632 at 646.

⁸² *Reid v Barnett* (1903) 22 NZLR 964 at 966. Oddly, this was a decision of Stout CJ..

⁸³ Thus in *Kenealy v Karaka* (1906) 26 NZLR 1118, an interesting negligence case, counsel cited three US cases, all apparently derived from the *American and English Encyclopedia of Law* and Stout CJ cited not only those three but a fourth. Compare *Latter v Parsons* (1906) 26 NZLR 645 at 653.

considered.⁸⁴ A particularly good example of such embedded references is provided by *Woolworths (NZ) Ltd. v Wynne* [1949] NZLR 90 where the Court of Appeal referred to two American decisions from the 1880s because they were cited in an New Zealand decision in 1892 without making any attempt to indicate whether or not the American law had changed in the intervening 60 years.⁸⁵ As time went by judges were able to make use of the newly-available digests to check that such overseas authority remained valid. In at least one case a judge had to point out that a Canadian case discussed in an earlier New Zealand case had since been overturned by the Privy Council.⁸⁶

In other cases the “embedded” references gained very considerable authority from the case in which they had previously been cited. Thus in *R v Jackson* [1919] NZLR 607 the Court of Appeal had to consider the extraterritorial legislative competence of New Zealand. It considered a number of Australian cases in which American law had been extensively discussed. Although these American cases are traversed by Stout CJ, it is clear that the other judges are very much more reliant on the precedent value of the Australian decisions.⁸⁷

These different kinds of process should not be seen as mutually exclusive. We can for instance consider an insurance case - *Brown v Ocean Accident and Guarantee Corporation* [1916] NZLR 380 at 380-382 - where counsel cited material from *Bennett’s Fire Insurance Cases* but the judge relied less on these cases than on a Canadian decision which had been endorsed by an Australian court. In that case Cooper J particularly noted that the Canadian case was not available in New Zealand (a view which may have been wrong because it would appear that the ODLs library probably did hold the relevant volumes) but he was prepared to base his judgment on the citations in the Australian judgment.

Another case showing similar behaviour deserves mention - not for its legal complexity but because it is the only citation that I have seen to a decision from Newfoundland prior to its incorporation in the Dominion of Canada. In 1954 the case of *Re Hennebury’s Will* (1859) 4 Nfld L.R 288 was cited, and distinguished in the case of *In re Hannah (deceased) Hannah v Hannah* [1954] NZL.R., 836.⁸⁸ It appears clear that the reference came from a textbook – *Dobie’s Probate Administration and Practice in New Zealand*, p64- which in turn had derived the reference from the *English and Empire Digest*.

⁸⁴ See *Paul v Rowe* (1904) 24 NZLR 641 at 643; *Baird v Fergusson* (1911) 31 NZLR 33; *Minister of Customs v Ross & Glendining* (1911) 31 NZLR 220; *Minister of Customs v Waihi Gold-mining Co* (1912) 31 NZLR 1160; *Ormond v Portas* [1922] NZLR 570 and *Grose v Coulston* [1932] NZLR 1485, 1490.

⁸⁵ For other examples of “embedded” references see *In re An arbitration between sun newspapers Ltd & New Zealand Newspapers Ltd* [1931] NZLR 686, 705 (two Canadian cases referred to in a Privy Council decision) and *In re Stone* [1931] NZLR 1039, 1044 (two American cases cited in an English judgment).

⁸⁶ See *Ayson v Commissioner of Taxes* [1938] NZLR 282 referring to *Reilly v The King* [1932] Ex Ch CR 14 on app [1932] SCR 597; compare *Marsh v Absolum* [1940] NZLR 448 (CA) and *Matheson v Attorney-General* [1956] NZLR 849 at 851.

⁸⁷ See also *R. v Harper* (1893) 12 NZLR 413 at 419; *In re Award of Wellington Cooks and Stewards’ Union* (1906) 26 NZLR 394 at 422; *Beath & Co Ltd v Union Steamship Co Ltd* [1919] NZLR 282 at 284; *Godfrey v Gilbert* [1936] NZLR 699, 722.

⁸⁸ The judge noted the actual report was unobtainable in New Zealand.

(iv) *areas of law where North American cases were cited*

(a) to 1920

It is probably easier to generalise about the nature of litigation where North American cases were cited for the period to 1920 than it is for the later period.

In the early period, references to American law are most frequent in the commercial law area - particularly insurance cases of which there are 8 cases 1879-1890,⁸⁹ debt and credit transactions⁹⁰ and three intellectual property cases.⁹¹

The other very substantial incidence of American references comes with litigation about negligence and personal injury – with six cases before 1900.⁹² The other references are diverse, but include, surprisingly, only two in criminal matters⁹³ and an interesting group of cases where American law was used in litigation affecting Maori interest, most notoriously in *Wi Parata v. Bishop of Wellington* (1877) 3 NZ Jur. N.S. SC 72 at 81.⁹⁴

(b) citations after 1920

The nature of litigation in which North American law was cited after 1920 is more diverse and harder to classify than is the case with earlier decades. It is certainly less common to find North American law being cited in commercial litigation, although there were still a number of insurance cases.⁹⁵

However tort and personal injury cases were once again important. Indeed one of the few cases in the 1930s where the judges considered North American cases at length is *Logan v Waitaki Hospital Board* [1935] NZLR 385, a case on a hospital's liability for negligence by a nurse. Counsel cited Canadian and US cases – as well as an article in “the *Fortnightly Law Journal Canada*” volume 4 p 152”.⁹⁶

⁸⁹ *White v. South British Insurance Company* (1879) O.B. & F. (SC) 23; *Mollison v. Victoria Insurance Company* (1883) 2 NZ LR SC 182; *Bank of New South Wales v. Royal Insurance Company* (1884) 2 NZ LR SC 345; *National Insurance Company v. Australian Mercantile Union Insurance Company* (1887) 6 NZ LR 153; *Holmes v. National Fire Insurance Company*, (1887) 5 NZ LR SC 360; *Scott v Accident Association Of New Zealand* (1888) 6 NZ LR 271; *Bowes v. National Fire and Marine Insurance Company*, (1888) 7 NZ LR 32; *Dorset v. New Zealand Insurance Company* (1890) 8 NZ LR 308 at 313.

⁹⁰ *Otago and Southland Investment Company v. Burns* (1874) 2 NZ CA. 551 at 586; *Brown v. Bennett* (1891) 9 NZ LR 514.

⁹¹ *Beecham v. Hanlon* (1894) 12 NZ LR 554; *Thomson v. Phillips* 14 NZ LR 29 at 49; *Shacklock v. Brinsley* (1896) 16 NZ LR 364 at 370.

⁹² *McBride v. Brogden* (1876) 3 NZ CA 271; 2 NZ Jur. N.S. CA 28; *Nystrom v. Cameron* (1891) 9 NZ LR 433; *District of Auckland Hospital and Charitable Aid Board v. Lovett* (1892) 10 NZ LR 597; *Heenan v. Iredale*, (1901) 19 NZ LR 387 at 391; *Linklater v. Minister for Railways* (1900) 18 NZ LR 540; *Donaghy v. Brennan* (1900), 19 NZ LR 289 at 294.

⁹³ *R. v. Hall* (1887) 5 NZ LR CA 106; *R v Ross* (1887) 6 N.Z LR 87 at 9.

⁹⁴ See also *Te Raihi v. Grice* (1886) 4 NZ LR CA 219.

⁹⁵ *Colonial Mutual Life Assurance Society Ltd v Long* [1931] NZLR 528 at 539; *Mercantile Finance Corporation Ltd v New Zealand Insurance Co Ltd* [1932] NZLR 1107; *Lundberg v Royal Exchange Assurance Corporation* [1933] NZLR 605 and *Murdoch v British Israel World Federation (New Zealand) Inc and Another* [1942] NZLR 600.

⁹⁶ See also *Munt v The King* [1932] NZLR 1691, 1699; *Wellington City Corporation v Laming* [1933] NZLR 1435. Cases in other fields which involved substantial discussion of Canadian material include *Colonial Mutual Life Assurance Society Ltd v Long* [1931] NZLR 528 at 539; *Murdoch v British Israel World Federation (New Zealand) Inc and Another* [1942] NZLR 600 and *Public Trustee v Commissioner of Stamp Duties* [1942] NZLR 170.

These cases illustrate a shift in apparent professional practice. By the early to mid-1950s it appears that recourse to the Canadian judgments had become a fairly standard procedure for counsel who wished to demonstrate that a substantial and careful argument was being mounted. One of the clearest examples is in the field of tort or personal injury litigation where Canadian cases on contributory negligence statutes were canvassed in some detail in the New Zealand courts because the legislation in the Canadian provinces was in very much the same terms as the New Zealand statute.⁹⁷

This is not to say that careful argument always brought it proper reward. For example, in *In re Macleay (deceased) Treadwell v Macleay* [1935] NZLR 463, 501 counsel had cited several Canadian judgments in traversing the law, but the judicial references to decisions outside England were essentially dismissive.⁹⁸ However it does become increasingly common to find citations where judges have treated Canadian law as part of the mainstream of the body of the precedent which they have to consider, rather than as something unusual and probably to be distrusted.⁹⁹

Curiously this habit appears to have developed earlier in civil cases than in criminal ones. Cases. Given that there was very substantial similarity between the New Zealand Crimes Act 1908 and the Canadian Criminal Code, we might expect to find the reverse. However until the 1950s, Canadian cases were rarely cited, and if cited were given little weight in the judgments.¹⁰⁰ There is for example the strange position that in a substantial argument in 1931 on the law of negligent manslaughter we find two Canadian cases cited, but these do not deal with substantial issue of criminal liability but rather relate to the quite separate question whether the New Zealand Court of Appeal was or should be bound by its own decisions.¹⁰¹ However by the early 1960s the Courts were more regularly citing and applying Canadian decisions in the criminal law area.¹⁰²

Two other features of the citation of Canadian case law stand out. The first is the extraordinary dominance between mid 1930s to the mid-1950s of the *Dominion Law Reports* as the report series. Case references to those reports outnumber references to

⁹⁷ In *Petersen v The King* [1950] NZLR 691 the law in at least five Canadian provinces was canvassed by counsel although O'Leary CJ did not traverse all the Canadian cases. See also *Griffin v F. T. Wimble and Co. (NZ) Ltd.* [1950] NZLR 774. For discussions of Canadian case law prior to statutory reform see *Bourke v Jessop (No 2)* [1934] NZLR s81; *Bourke v Jessop (No 3)* [1935] NZLR 246 CA and *Horning v Sycamore and Flexman* [1935] NZLR 581 (all discussing *Delaney v City of Toronto* (1921) 49 OLR 245; 64 DLR 122) and *Godfrey v Gilbert* [1936] NZLR 699, 722. For a similar example of careful consideration of a Canadian case dealing with a similarly worded statute see *In re an Arbitration Broughton and Renown Collieries Ltd* [1941] NZLR 227.

⁹⁸ Compare the similar attitude in *Best v Newton King Ltd* [1942] NZLR 360 in the Court of Appeal.

⁹⁹ See for example *Re Burney (A Bankrupt) ex parte Official Assignee* [1955] NZLR 1071 at 1073; *In re Hunter (deceased), New Zealand Insurance Co Ltd. v Hunter* [1958] NZLR 654 and *Beals v Hayward* [1960] NZLR 131.

¹⁰⁰ See *R v Mareo (No. 3)* [1946] NZLR 660, *R v Kahu* [1947] NZLR 368; *R v Brown* [1948] NZLR 928 *R v Roach* [1948] NZLR 677 and *Purdie v Maxwell* [1960] NZLR 599.

¹⁰¹ *R v Storey* [1931] NZLR 417, 472 citing *Desormeaux v Village of Ste Therese de Blainville* (1910) 43 Can SCR 82 and *Duval v Maxwell* (1901) 31 Can SCR 459.

¹⁰² See *R v Noel* [1960] NZLR 212; *R v Lanham and Gilmore* [1961] NZLR 735; *R v Reisterer* [1962] NZLR 1040.

other reports by about 6 to 1 (59 to 9 by my count). The great advantage of the *Dominion Law reports* series was that it was apparent that other Law Societies had followed Otago's lead so that judges in all parts of the country regularly had access to the full text of the Canadian decisions.¹⁰³

The second feature of the post-1945 period is that we first see overseas decisions being cited soon after they were made. This had always been possible given that law reports were generally arriving on a regular basis by mail. However the newer the case law, the more certain it was that it would not have been referred to in any digests or other secondary material. The use of new material therefore indicates that lawyers or judges were prepared to make themselves familiar with new issues of overseas law reports as they become available. It is interesting that the first examples of this behavior are shown by Gresson J who had for some years before his appointment to the bench been a teacher (and for many years Dean) of the University of Canterbury Law Faculty.¹⁰⁴ It is possible that a former university teacher may have been particularly inclined to keep up to date with overseas developments.¹⁰⁵

(iv) *Judicial attitudes*

We need to have some degree of caution in assessing the degree of influence that American law had over the New Zealand courts. As I have endeavored to explain most of the references to North American decisions were in cases where it was thought there was little difference between English and American law or where there was no relevant English case law.

I have found no cases where the New Zealand judiciary preferred American authority to a clear English decision, but there are several cases going the other way, where American cases were not applied because it was thought they did not accord with English law.¹⁰⁶

One of the very few cases where one can genuinely say that American law was determinative of the case is litigation in Auckland between the local body and a gas company as to the ability of the local body to levy rates on the gas company's pipes and other physical assets underlying public roadways.¹⁰⁷

It is notable that such American references quite commonly came where the Court was faced with issues arising from technology only recently imported to New Zealand, as with issues of negligent driving of motor vehicles or involving aeroplanes.¹⁰⁸

¹⁰³ See for example *In re Mills (deceased)*, *Mills v J R Mills and Son Ltd*. [1949] NZLR 221.

¹⁰⁴ See Jeremy Finn "Sir Kenneth Gresson: a study in judicial decision making" (1997) 6 Canterbury LR 481.

¹⁰⁵ See for example *In re Allen (deceased)*, *Millar v Allen*, [1948] NZLR 1235 at 1241 citing *Re Clark* [1947] 1 DLR 371. For an example of Gresson J relying on an older Canadian case not cited by counsel see *In re A Medical Practitioner* [1959] NZLR 784

¹⁰⁶ See for example *Webb v Cassidy* (1907) 27 NZLR 489; *Benge & Pratt v Guardian Assurance Co* (1914) 34 NZLR 89.

¹⁰⁷ *Auckland City Corporation v Auckland Gas Co Ltd* [1918] NZLR 1037, affirmed [1919] NZLR 561.

¹⁰⁸ See, respectively, *Aitchison v Samson* (1911) 30 NZLR 166 and *Dominion Air Lines Ltd (in liquidation) v Strand* [1933] NZLR 1.

An analogous use of American law where England provided no guidance is to be found in litigation following a major earthquake in 1931¹⁰⁹ and in a case involving title to land where rivers had altered course.¹¹⁰

Not all judges favoured North American law. By far the most dismissive reference to American law comes in the judgment of Alpers J in *Black & White Cabs Ltd v Hagen* [1927] NZLR 535 at p537-38 where he criticised *Seattle Taxicab Co v (Deceased) Jarlais* 236 Pac Rep 785 on the basis that "...much platitudinous law is expressed in language which is certainly not good English and, one hopes, is not good American either"; and then claimed that there were "so many cases expressed in the English language that I do not find it necessary to invoke the aid of American state reports."

(vi) three important individuals

I want here to start with the interesting and perhaps suggestive fact that in the 1890s – under the influence of Sir Joshua Williams, the citation of American cases in cases from Dunedin area almost equals those from all other areas of New Zealand combined. Whether this is a reflection of Sir Joshua's own views, or of the readiness of Otago counsel to cite American law is not clear. It is difficult to ascertain exactly the extent of the Otago influence in the citation of American cases because it is clear that on some occasions Dunedin counsel appeared in other centres.¹¹¹

There is no such ambiguity about the single most regular citer of North American law. Sir Robert Stout – lawyer, Premier and Chief Justice - probably needs little introduction to this audience, but it is relevant to emphasise that Stout learned his law in Dunedin and was in practice there for many years until politics took him to Wellington. Joshua Williams also had long Dunedin connections, and I think it no accident that they were much more likely to cite American judgments than were judges from other areas. Stout marked his accession to the Chief Justiceship with a number of references to American law, something which was to be a feature of his entire judicial career.¹¹²

There is a large number of cases where Stout amplified his judgment by citing American authorities not cited by counsel.¹¹³ It was a characteristic of the Chief Justice that he should make such unprompted American references only after canvassing the other relevant authorities and coming to his conclusion, which we would then say accorded well with the American law. Whether this technique was intended to defuse any potential

¹⁰⁹ *Borthwick (Thomas) & Sons (Australasia) Ltd v Ryan* [1932] NZLR 225, 240-241. Myers CJ was the only member of the Court of Appeal to cite the US cases.

¹¹⁰ See *Humphrey v Burrell* [1951] NZLR 262 at 280-81.

¹¹¹ One identifiable example of that is *R. v. Hall* (1887) 5 NZ LR CA 106.

¹¹² See *The "Queen Eleanor"* (1899) 18 NZ LR 82.; *Common, Shelton, & Co. v Timaru Milling Company*, (1899) 18 NZ LR 321; *Harris v. Aldous*, (1899) 18 NZ LR 449 at 461; *Glenny v. Rathbone* (1900) 20 NZ LR 1; *Jones v. New Zealand Trust and Loan Company* (1900) 19 NZ LR 449 at 455. (CA 1900.)

¹¹³ See for example *Assets Co v R* (1902) 22 NZLR 459 at 469 citing *Leather Manufacturers' Bank v Merchants Bank* 128 U.S Rep 26; *Jellicoe v Haselden* (1902) 22 NZLR 343 at 352 citing *Yates v Lansing* 5 Joh 282, 9 Joh 395; 6 Amer Dec 290; *Beauchamp v Johnston* (1903) 22 NZLR 926 citing *Akers v Akers* 57 Amer. Rep. 207

For a similar approach by another judge see *Crisp v Snowsill* [1917] NZLR 257.

criticism of these unsolicited references, or was a genuine attempt to educate the New Zealand profession as to American law.¹¹⁴ There were occasions where other judges appear to have considered that the Chief Justice overstated the similarity of English and American law.¹¹⁵

While Sir Robert Stout CJ dominated the citation of American authority for many years one of his successors, Sir Michael Myers has a similar though rather less marked role in the citation of Canadian cases in the 1940s. Indeed the similarity extends to the manner in which the Canadian cases were cited. Myers frequently pursued the same tactic as had Stout of citing a Canadian case not mentioned by counsel only at the end of the judgment to confirm a view which had been formed on the basis of case law from New Zealand or England or Australia.¹¹⁶ One other, judge, the suitably named Fair J indicated a similar approach, though on fewer occasions.¹¹⁷

5. Critique and evaluation: the place of secondary materials

A plausible explanation of the data I have gathered so far is that possession of or access to the full text of judgments of the courts in some overseas jurisdiction is not enough for that law to have any significant influence in another legal system. Lawyers require the information in the volumes of the law reports to be made accessible to them by secondary literature such as digests, abridgements or textbooks. Unless such resources were available few lawyers will have had the time or the inclination or the financial resources to wade through the volumes of overseas materials to find relevant law.

In support of this thesis, consider the following. In the period up to the First World War there are only a tiny number of Canadian cases referred to by the judges - and even counsel seem rarely to have cited Canadian material. This cannot be explained simply on the basis that Canadian materials were not available. The Otago district library had a complete set of the Canadian *Supreme Court Reports* from 1889. Yet there is little sign that these were ever referred to by the judges.

¹¹⁴ Eg *New Zealand Shipping Co v Wellington Harbour Board* (1914) 33 NZLR 1403 at 1406; *In re Broadbent* [1916] NZLR 821 at 824; *In re Knowles, Brown v Knowles* [1916] NZLR 83 at 114; *Pukuweka Sawmills Ltd v Winger* [1917] NZLR 81 at 92; *R v McNamara* [1917] NZLR 394 (CA); *Todd v Commissioner of Stamp Duties* [1923] NZLR 536.

¹¹⁵ Compare the different views of Stout CJ and Denniston J in *Miller v Union Steamship Co Ltd* [1918] NZLR 247.

¹¹⁶ See for example in 1945 alone *Jackson v De Havilland Aircraft Co of New Zealand Ltd* [1945] NZLR 250 at 260, citing *Everett v Schaake* (1912) 4 D.L.R 147 and *Re Northern Navigation Company* (1912) 6 D.L.R 69; *Re Weston and Guardian Trust and Executors Co of New Zealand Ltd v Commissioner of Stamp Duties* [1945] NZLR 192 at 198 citing *Re Gwynne* (1912) 5 D.L.R 713 and *In re Isdale, Isdale v Medical Council*, [1945] NZLR 136 citing *Re Washington*, (1893) 23 OR 299. For a similar tactic with US material see *In re Hourigan* [1946] NZLR 1 and see also *Leyland Motors Ltd v Napier Harbour Board* [1930] NZLR 113, 125.

¹¹⁷ See *Hardwick v Lincoln* [1946] NZLR 309; *Jennings v Taylor* [1952] NZLR 492 and *O'Donoghue v Downer and Co. Ltd.* [1953] NZLR 758. Compare Reed J in *Fraser v John Fuller and Sons Ltd* [1937] NZLR 755, 757.

Citations of Canadian cases increase rapidly in and after the 1920s. Indeed the number of Canadian citations rapidly overtakes and outpaces the American citations throughout the period to 1960.¹¹⁸ Why? Largely I suggest because the New Zealand profession had access to a secondary material - first the *English and Empire Digest* and later the *Canadian Abridgment* which made it possible to discover relevant Canadian or relatively easily.

This hypothesis would also conveniently explain the patterns of citation of American authority which we find in the period up to just after the First World War. In the first years under study it was very common for cases to be cited from the *United States Digest* or from the *American and English Encyclopedia of Law*; it was uncommon to the point of extreme rarity to see reference being made to the full text of a decision of the courts. In the period immediately after the First World War there is a substantial volume of American material cited but it tails off very rapidly after 1932 – indeed from 1933 until the 1960s there is no year where more than five United States cases are cited.

Why is this? One possible explanation is simply that the law societies had ceased to keep their secondary American materials in a state which practitioners found readily usable. It is significant that the ODLS decided in the late nineteen twenties check to forgo purchase of new volumes of the *American Digest*.

There is also a considerable evidence of a similar phenomenon in regard to the citation of law from other jurisdictions. This is a point I hope to develop further in later studies but for now it may suffice to say that there is a astonishing growth in the citation of Australian authority from the 1940s, to the point where by 1980 several hundred Australian cases are cited every year. It is a very noticeable that this growth seems, on the work so far, to correlate well with the pattern of acquisition of digests and other secondary Australian material by the ODLS Library.

Indeed it could almost be said that a large part of the story of New Zealand legal culture in regard to North American law is the supplanting of the *American and English Encyclopedia of law* by the *English and Empire Digest* and that work, in its turn, being overtaken in importance by the Australian materials.

¹¹⁸ Although it is outside the period of this present paper I would note that the latter decades to 1988 showed an even greater dominance of Canadian law.